Hennigan, Bennett & Dorman Llp

hennigan@hbdlawyers.com waltersc@hbdlawyers.com Attorneys for Defendants William E. and Desiree B. Moore Revocable Trust; Trustees of The William E. and Desiree B. Moore Revocable Trust; Desiree B. Moore Revocable Trust;

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO AND OAKLAND DIVISION

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K-M INDUSTRIES HOLDING CO., INC.; K-M INDUSTRIES HOLDING CO., INC. ESOP PLAN COMMITTEE; WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST; TRUSTEES OF THE WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST; CIG ESOP PLAN COMMITTEE; NORTH STAR TRUST COMPANY; DESIREE B. MOORE REVOCABLE TRUST; WILLAIM E. MOORE MARITAL TRUST; WILLIAM E. MOORE GENERATION-SKIPPING TRUST; and DESIREE MOORE, BOTH IN HER INDIVIDUAL CAPACITY AND AS TRUSTEE OF THE WILLIAM E AND DESIREE B. MOORE REVOCABLE TRUST'S SUCCESSOR Case No. C 06-07339 CW

SEPARATE REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST, TRUSTEES OF THE WILLIAM E. AND DESIREE B. MOORE REVOCABLE TRUST, DESIREE B. MOORE REVOCABLE TRUST, WILLIAM E. MOORE MARITAL TRUST, WILLIAM E. MOORE **GENERATION-SKIPPING TRUST** AND DESIREE B. MOORE

Date: July 31, 2008 Time: 2:00 p.m. 2, 4th Floor Ctrm:

Hon. Claudia Wilken Judge:

Case No. C 06-07339 CW

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I. PLAINTIFFS FAIL TO DEMONSTRATE ANY AFFIRMATIVE ACTS OF CONCEALMENT BY THE MOORE TRUST DEFENDANTS OR DESIREE MOORE

It is undisputed that the Moore Trust, the seller of the shares to the ESOPs, was a nonfiduciary party in interest to the initial 1998 and 1999 transactions. A non-fiduciary party in interest's liability under ERISA is strictly limited to equitable relief for its participation in a prohibited transaction. Nieto v. Ecker, 845 F.2d 868, 871 (9th Cir. 1988). As the Moore Trust Defendants indisputably had no fiduciary duties, Plaintiffs only allege a Section 1106 claim against them for the Moore Trust's participation in the alleged prohibited transactions. Having conceded this claim accrued in 1998 and 1999, in order to save it from the statute of repose, Plaintiffs must demonstrate "affirmative steps" taken to conceal the alleged Section 1106 violation. Barker v. American Mobil Power Corp., 64 F.3d 1397, 1401-02 (9th Cir. 1995).

Plaintiffs fail to cite any evidence of such "affirmative steps." Rather, the "concealment" facts that Plaintiffs argue save their claims against the Moore Trust Defendants are that the Moores knew about asbestos litigation, and William Moore failed to disclose "his knowledge about the asbestos litigation" to employees, valuators and auditors. (Opp. pp. 38-40.)² As demonstrated in the Combined Reply, such failures to disclose do not rise to the level of fraudulent concealment. (Combined Reply, pp. 3-6.)

Plaintiffs' concealment theory against Desiree Moore is even more feeble. Plaintiffs cite no affirmative acts by Desiree Moore to conceal the alleged breaches in 1998 and 1999. The only specific facts Plaintiffs cite relating to Desiree Moore are that she was a co-trustee of the Moore Trust and a member of the boards of the various Kelly-Moore companies. Therefore, Plaintiffs argue, she had knowledge of Kelly-Moore's asbestos liability issues that she failed to disclose to, or

Though not germane to this particular motion, as a matter of law, a trust cannot be "liable" for anything, as it is not a legal entity that can be sued. Rather, suit must be brought against the trustee in its representative capacity. Cal. Probate Code § 18004 (Thompson Reuters/West 2008); *Galdjie v. Darwish*, 113 Cal. App. 4th 1331, 1349 (2003).

Plaintiffs also assert that Desiree Moore-Trustee is "legally chargeable with Mr. Moore's acts of concealment, because she did nothing to stop them." (Opp. p. 40.) Plaintiffs cite no evidence to support their statement that Mrs. Moore "did nothing to stop" Mr. Moore.

under Plaintiffs' new theory, "conceal from" participants. (Opp. p. 40.) Again, the mere failure to 1 disclose does not rise to the level of fraudulent concealment within the meaning of Section 1113. 2 3 Accordingly, as Plaintiffs' claims are all barred by the statute of repose, summary judgment 4 should be granted in favor of the Moore Trust Defendants and Desiree Moore. 5 6 7 DATED: July 17, 2008 HENNIGAN, BENNETT & DORMAN LLP 8 9 J. Michael Hennigan 10 11 Attorneys for Defendants WILLIAM E. AND DESIREE B. MOORE 12 REVOCABLE TRUST; TRUSTEES OF THE WILLIAM E. AND DESIREE B. MOORE 13 REVOCABLE TRUST; DESIREE B. MOORE REVOCABLE TRUST; WILLIAM E. MOORE 14 MARITAL TRUST; WILLIAM E. MOORE GENERATION-SKIPPING TRUST; and 15 **DESIREE MOORE** 16 17 18 19 20 21 22 23 24 25 26 27

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